(1)
Supreme Court, U.S.
FILED
No. 00 1274 FEB 6 2001
OFFICE OF THE CLERK

In the

Supreme Court of the United States

VALENCIA CAMPBELL; DEAGELIA M. PEÑA; BARBARA VALENTINE; CHERYL LUCAS; TASHA MCGUTHRIE;

Petitioners,

versus

NATIONAL EDUCATION ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD L. SWICK
Counsel of Record
DAVID H. SHAPIRO
SWICK & SHAPIRO, P.C.
1225 Eye Street, N.W.
Washington, D.C. 20005
(202) 842-0300
Attorneys for Petitioners

48

QUESTION PRESENTED

Whether petitioner have sufficiently established that they have suffered adverse personnel actions which are actionable under the federal civil rights statutes.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 5
REASONS FOR GRANTING THE WRIT 8
CONCLUSION 20
APPENDIX
CIRCUIT COURT OPINION 1a
ORDER OF JUNE 10, 1999 ..... 11a
ORDER OF FEBRUARY 2, 1999 ..... 12a
ORDER OF OCTOBER 30, 1998 ..... 14a
ORDER OF FEBRUARY 27, 1997 ..... 15a
MEMORANDUM AND ORDER OF NOVEMBER 21, 1996 ..... 16a
ORDER OF NOVEMBER 8, 2000 ..... 21a
ORDER OF NOVEMBER 8, 2000 ..... 22a

TABLE OF AUTHORITIES

CASES

BARBOUR V. MERRILL, 48 F.3D 1270, 1276 (D.C. CIR. 1995)8
BERRY V. STEVINSON CHEVROLET, 74 F.3D 980, 986 (10TH CIR. 1996) 13
BOONE V. GOLDIN, 178 F.3D 253, 256 (4TH CIR. 1999) 16
BREAUX V. CITY OF GARLAND, 205 F.3D 150, 157 (5TH CIR. 2000) 18
BROWN V. BRODY, 199 F.3D 446 (D.C. CIR. 1999) ... 5, 18, 19
CAMPBELL V. NATIONAL EDUCATION ASS'N, 2000 WL 1584589 19
CORNEVEAUX V. CUNA MUTUAL INSUR. GROUP, 76 F.3D 1498, 1502 (10TH CIR. 1996) 13
DAHM V. FLYNN, 60 F.3D 253, 257 (6TH CIR. 1994) 13
DE LA CRUZ V. NEW YORK CITY HUMAN RESOURCES ADMIN. DEP'T OF SOCIAL SERVS., 82 F.3D 16, 21 (2D CIR. 1996). 11
DOE V. DEKALB COUNTY SCHOOL DIST., 145 F.3D 1441, 1448 (11TH CIR. 1998) 13
DOLLIS V. RUBIN, 77 F.3D 777 (5TH CIR. 1995) 17, 18
EVANS V. MCCLAIN OF GA., INC., 131 F.3D 957, 964 (11TH CIR. 1997) 14
HASHIMOTO V. DALTON, 118 F.3D 671, 676 (9TH CIR. 1997)9, 10
HERNANDEZ-TORRES V. INTERCONTINENTAL TRADING, 158 F.3D 43 (1ST CIR. 1998) 11
HINSON V. CLINCH COUNTY, GA. BD. OF EDUC., 231 F.3D 821 (11TH CIR. 2000) 14
HOFFMAN V. RUBIN, 193 F.3D 959, 964 (8TH CIR. 1999) 17
JEFFRIES V. KANSAS, 147 F.3D 1220, 1232 (10TH CIR. 1998) 13
KNOX V. INDIANA, 93 F.3D 1327, 1334 (7TH CIR. 1996) 12
KOCSIS V. MULTI-CARE MANAGEMENT, INC., 97 F.3D 876 (6TH CIR. 1996) 16, 17
LEDERGERBER V. STANGLER, 122 F.3D 1142, 1144 (8TH CIR. 1997) 17

MATTERN V. EASTMAN KODAK CO., 104 F.3D 702 (5TH CIR. 1997) 17, 18
MCCABE V. SHARRETT, 12 F.3D 1558, 1564 (11TH CIR. 1994) 14, 15
PAGE V. BOLGER, 645 F.2D 227, 233 (4TH CIR. 1981)... 16, 18
PALMER V. SHULTZ, 815 F.2D 84 (D.C. CIR. 1987) 19
PAQUIN V. FEDERAL NAT'L MTG. ASS'N, 935 F. SUPP. 26, 30 (D.D.C. 1996)..... 2, 8
PASSER V. AMERICAN CHEMICAL SOC'Y, 935 F.2D 322 (D.C. CIR. 1991) 8
RAY V. HENDERSON, 217 F.3D 1234, 1243 (2000)..... 8, 10, 11
RICHARDSON V. NEW YORK DEP'T OF CORRECTIONAL SERV., 180 F.3D 426, 444 (2D CIR. 1999)..... 12
RODRIGUEZ V. BOARD OF EDUC., 620 F.2D 362 (2D CIR. 1980) 11
SANCHEZ V. DENVER PUB. SCHS., 164 F.3D 527, 532 (10TH CIR. 1998) 13, 14
SHACKELFORD V. DELOITTE & TOUCHE, LLP, 190 F.3D 398 (5TH CIR. 1999) 18
SIMAS V. FIRST CITIZEN'S FED. CREDIT UNION, 170 F.3D 37, 50 (1ST CIR. 1999)..... 11
SINCE COLLINS V. STATE OF ILLINOIS, 830 F.2D 692 (7TH CIR. 1987) 12
SMART V. BALL STATE UNIV., 89 F.3D 437, 441 (7TH CIR. 1996) 12
SPEARS V. MISSOURI DEP'T OF CORRECTIONS AND HUMAN RESOURCES, 210 F.3D 850 (8TH CIR. 2000)..... 17
ST. JOHN V. EMPLOYMENT DEVELOPMENT DEP'T, 642 F.2D 273, 274 (9TH CIR. 1981) 9
STROTHER V. SOUTHERN CAL. PERMANENTE MED. GROUP, 79 F.3D 859, 869 (9TH CIR. 1996)..... 9
WHITE V. NEW HAMPSHIRE DEP'T OF CORRECTIONS, 221 F.3D 254, 262 (1ST CIR. 2000)..... 11
WIDEMAN V. WAL-MART STORES, INC., 141 F.3D 1453, 1456 (11TH CIR. 1998)..... 14
WYATT V. CITY OF BOSTON, 35 F.3D 13, 15-16 (1ST CIR. 1994) 11

YARTZOFF V. THOMAS, 809 F.2D 1371, 1376 (9TH CIR. 1987) 9
YATES V. AVCO CORP, 819 F.2D 630, 638 (6TH CIR. 1987). 16

Statutes

28 U.S.C. § 1254(1) 2
42 U.S.C. § 1981 ..... 2, 5, 8
42 U.S.C. § 2000e-2 18
42 U.S.C. § 2000e-3 18
42 U.S.C. §1981 2
D.C. Code § 1-2512 (1981) 3
D.C. Code § 1-2525 (1981) 4, 5
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e 8

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

VALENCIA CAMPBELL ET AL.,

Petitioners,

vs.

NATIONAL EDUCATION ASSOCIATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petitioners, Valencia Campbell, Cheryl Lucas, Tasha McGuthrie, Deagelia M. Peña and Barbara Valentine respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The unreported Court of Appeals opinion is reproduced in the Appendix filed herewith at 1a-10a. The

unreported decisions of the District Court are reproduced at 11a, 16a-20a. The Order of the Court of Appeals denying a petition for rehearing en banc is reproduced at 21a-22a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on October 3, 2000. Rehearing en banc was denied on November 8, 2000. The Court of Appeals mandate issued on November 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of 42 U.S.C. § 1981 and the District of Columbia Human Rights Act[1] are set forth below:

42 U.S.C. §1981:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and

---

[1] The legal standards governing claims pursuant to the D.C. Human Rights Act are the same as those governing the federal civil rights laws. *See Paquin v. Federal Nat'l Mtg. Ass'n*, 935 F. Supp. 26, 30 (D.D.C. 1996), *aff'd in part and rev'd in part*, 119 F.3d 23, 27-28 n.1 (D.C. Cir. 1997).

to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

D.C. Code § 1-2512 (1981):

(a) General. -- It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual:

(1) By an employer. -- To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including

> promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee;
>
> * * *
>
> (4) By an employer, employment agency or labor organization. -- (a) To discriminate against any individual in admission to the employment in, any program established to provide apprenticeship or other training or retraining, including an on-the-job training program;

D.C. Code § 1-2525 (1981):

> (a) It shall be an unlawful discriminatory practice to coerce, threaten, retaliate against, or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected under this chapter.

STATEMENT OF THE CASE

Petitioners request a writ of certiorari because the District of Columbia Circuit decision issued in this case on October 3, 2000, conflicts with decisions of this Court and other circuit courts, and conflicts with prior decisions of District of Columbia Circuit. The D.C. Circuit Court of Appeals affirmed the district court's entry of summary judgment against petitioners here, holding that the course of abuse and harassment to which petitioners were subjected did not amount to a sufficient adverse action to trigger the protections of the discrimination statutes.

The D.C. Circuit ruled that the years of harassment and abuse visited upon Petitioners by their employer (Respondent) did not violate the discrimination statutes, 42 U.SC. § 1981 and D.C. Code § 1-2525. The D.C. Circuit purported to reach its by interpreting *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999) to hold that on-the-job race-based harassment and abuse that Petitioners suffered is not actionable. This interpretation of, *Brown* conflicts with the express provisions of the federal civil rights statute and with prior decisions of this Court and the decisions in other circuits.

Petitioners therefore seek a writ of certiorari to review the D.C. Circuit's affirmance of the district court's judgment in favor of the Respondent. A Supreme Court review could decide whether the adverse personnel actions that Petitioners suffered are actionable under the federal civil rights statutes, and resolve the split among the Circuit Courts of Appeals about what constitutes actionable personnel actions under those statutes.

II. Background.

Petitioners are five highly educated non-white women who were employed in the Research Division of NEA for periods ranging from 8 to 21 years. Petitioners Dr. Valencia Campbell and Dr. Deaglia Peña have Doctorates; Petitioner Barbara Valentine has a Masters degree; and Petitioners Tasha McGuthrie and Cheryl Lucas have Bachelors degrees.

Throughout her employment at NEA, each Petitioner consistently sought promotion opportunities within the Research Division. However, as of November 26, 1991, when this law suit was filed, some of the Petitioners had never been promoted, and the others had been promoted rarely and minimally. For example, Dr. Peña had a Ph.D. at the time she was hired in 1981 as a Rank 11. However, other employees with high school diplomas were promoted to Rank 12 or higher into management positions. In her twelve years at NEA, Dr. Peña had never been promoted. Similarly, Dr. Campbell was hired with a Ph.D. in 1985 as a Rank 10 and was never promoted. Indeed, no minority woman had *ever* held a position at a Rank 12 or had been a manager within the Research Division of NEA.

The other three Petitioners have been similarly frustrated in their efforts to receive promotions. Ms. Lucas, who has a B.A. degree, was hired in 1971 to work in the Research Division as a secretary. While Ms. Lucas was kept in place, she watched others having only high school diplomas steadily rise through the ranks at NEA. In her 21 years at NEA, Ms. Lucas had only been promoted twice. Indeed, her last promotion was in 1981. Similarly, appellants McGuthrie and Valentine were rarely promoted throughout their respective 21 and 22 years of service at NEA

Petitioners provided evidence that the promotion system within the Research Division at NEA operated to deny minority women employees promotions based on their sex and race or national origin to the extent that they were (1) denied promotion-enhancing opportunities and (2) subjected to disparate treatment by Research Division supervisors and selecting officials.

Petitioners presented evidence that it was not simply the case that minority women applied for positions and were rejected. In subtle ways, Respondent NEA treated non-minorities and men differently from minority women. For example, as a result of NEA's discriminatory policies and practices, non-minorities and men were often pre-selected for promotions and, through the process of reclassification, subsequently given higher graded positions without the necessity of formal application. When "competitive" promotions were used, the job criteria were tailored to the qualifications of pre-selected candidates who were either non-minorities or men. Evidence also showed that the selecting officials acted with discriminatory bias in making these supposedly competitive selections.

Direct evidence showed Respondent's discriminatory animus and practices. Ron Henderson, the Director of the Research Division at NEA, made statements to two of the Petitioners confirming that the discriminatory promotion system at NEA worked to the disadvantage of minority women. For example, when plaintiff Peña asked Henderson about her chances for promotion, he told her that she did not stand a chance of being promoted, and that her accent was an "impediment" because NEA is an "Anglo-centered organization." Similarly, when Petitioner Lucas discussed her chances for promotion with Henderson, he told her that if she wanted to advance she should seek employment somewhere other than NEA, because she would not be

promoted at NEA "under any conditions" and that she has to "work harder and longer" because she is black.

The combined evidence showed that supervisors within the NEA Research Division subjected each of the Petitioners to harassment based on her sex and race or national origin, substantially prevented their advancement at NEA, and created a hostile working environment.

REASONS FOR GRANTING THE WRIT

I. *Brown v. Brody* Conflicts with other Circuit Courts of Appeal.

A. Ninth Circuit Observes Split.

The chief reason to grant review to this matter is to decide what constitutes an actionable adverse employment action under 42 U.S.C. § 1981.[2] Last year the Ninth Circuit in *Ray v. Henderson*, 217 F.3d 1234, 1243 (2000), observed that the federal circuits are currently split over what constitutes an adverse employment action. The Ninth Circuit said it accords with the First, Seventh, Tenth, Eleventh Circuits, and (incorrectly) the D.C. Circuit, which all take broader views of what constitutes an adverse employment action.[3]

---

[2] The Court's resolution of this conflict would also apply to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., *see Barbour v. Merrill*, 48 F.3d 1270, 1276 (D.C. Cir. 1995) and the D.C. Human Rights Act, D.C. Code § 1-2512. *See Paquin v. Federal Nat'l Mtg. Ass'n, supra*, 935 F. Supp. at 30.

[3] The Ninth Circuit in *Ray* cited *Passer v. American Chemical Soc'y*, 935 F.2d 322 (D.C. Cir. 1991), for the proposition that the D.C. Circuit defines adverse action broadly. That court apparently overlooked *Brown*

B. Ninth Circuit's Broad View of Adverse Employment Action.

For its part, the *Ray* court listed the wide array of workplace changes that constitute adverse employment actions, including:

- dissemination of an unfavorable job reference, even though it did *not* affect the prospective employer's decision not to hire the plaintiff. *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997).
- excluding employee from meetings, seminars and positions that would have made her eligible for salary increases, denying secretarial support, and giving a more burdensome work schedule to employee. *Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996).
- transferring employee's job duties and awarding undeserved negative performance ratings. *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987).
- transferring employee to another job of the same pay and status. *St. John v. Employment Development Dep't*, 642 F.2d 273, 274 (9th Cir. 1981).

The *Ray* court expressed its broad view, noting that "[w]hile some actions that we consider to be adverse (such as disadvantageous transfers or changes in work schedule) do

---

v. Brody, a subsequent D.C. Circuit decision that have effectively overruled *Passer*.

'materially affect the terms and conditions of employment,' others (such as an unfavorable reference not affecting an employee's job prospects) do not." *Ray*, 217 F.3d at 1242.

The *Ray* court also examined the EEOC definition of adverse action. The court noted that EEOC "has interpreted 'adverse employment action' to mean 'any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. . . . The EEOC test covers lateral transfers, unfavorable job references, and changes in work schedules. These actions are all reasonably likely to deter employees from engaging in protected activity.'" *Id.* at 1242-43. Moreover, since the EEOC test focuses on the deterrent effects it "effectuates the letter and the purpose of Title VII. *Ray*, 217 F.3d at 1243.

About the only actions not covered by the Ninth Circuit's broad definition of adverse action are "offensive utterance[s] by co-workers, because offensive statements by co-workers do not reasonably deter employees from engaging in protected activity." *Id.* at 1243. Whether an action affects a plaintiff's salary and/or benefits goes to issue of damages, not liability. *Hashimoto*, 118 F.3d at 676 ("[t]hat this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability").

C. First Circuit's Broad Definition.

Like the Ninth Circuit, the First Circuit has broadened the scope of adverse employment action, holding that "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees" all constitute adverse actions. *Wyatt v. City of Boston*, 35 F.3d

13, 15-16 (1st Cir. 1994) (acknowledging as individual adverse actions a school teacher's allegations that he was denied a promotion, received negative performance evaluations, transferred to a different school, and as a senior teacher there was not given the choice of classes he would teach); *see also White v. New Hampshire Dep't of Corrections*, 221 F.3d 254, 262 (1st Cir. 2000) (finding that employee suffered adverse action when she was transferred out of her unit without her consent and left on her own to find another unit); *Simas v. First Citizen's Fed. Credit Union*, 170 F.3d 37, 50 (1st Cir. 1999) (noting that "[t]he fact that [defendant] did not reduce [plaintiff's] salary or benefits, though plainly relevant, is not conclusive"); *Hernandez-Torres v. Intercontinental Trading*, 158 F.3d 43 (1st Cir. 1998)(Title VII retaliation provision encompasses a variety of adverse employment actions, including demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees).

D. Second Circuit's Broad Definition.

As early as *Rodriguez v. Board of Educ.*, 620 F.2d 362 (2d Cir. 1980), the Second Circuit acknowledged that "the protections provided by Title VII are not limited to 'instances of discrimination in pecuniary emoluments."[4] *Id.* at 366 (an art teacher's transfer from a junior high school to an elementary school held an adverse action). In *De La Cruz v. New York City Human Resources Admin. Dep't of Social Servs.*, 82 F.3d 16, 21 (2d Cir. 1996), the court determined that the employer's transfer of the plaintiff from one unit to another while maintaining the same pay rate created a

---

[4] In *Ray*, the Ninth Circuit categorized the Second and Third Circuits as taking an "intermediate position within the circuit split." *Ray*, 217 F.3d at 1242.

question of fact for a jury to decide whether the move from an "elite" division, which provided prestige and opportunity for advancement, to a less prestigious unit with little opportunity for professional growth, constituted an adverse action. *See also Richardson v. New York Dep't of Correctional Serv.*, 180 F.3d 426, 444 (2d Cir. 1999) (finding sufficient evidence to conclude that a transfer and reassignment involving different job responsibilities and requiring contact with the prisoner population constituted an adverse employment action).

E. Seventh Circuit's Broad Definition.

Since *Collins v. State of Illinois*, 830 F.2d 692 (7th Cir. 1987), the Seventh Circuit has held that "adverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well." *Id.* at 703; *see also Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) (stating that "when an employee is fired, or suffers a reduction in benefits or pay, it is clear that an employee has been the victim of an adverse employment action. But an employment action does not have to be so easily quantified to be considered adverse for our purposes"). While the Seventh Circuit has warned that "not everything that makes an employee unhappy is an actionable adverse action," *Smart*, 89 F.3d at 441, the *Collins* Court found that the plaintiff had suffered adverse actions as a result of her being placed in a new department where her supervisors did not even know what her job entailed, having her office taken away from her and being reassigned to a desk outside her supervisor's office where a receptionist would typically sit, and losing her phone, her business cards and her listing in professional directories and publications. *Id.*; *see also Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (stating that employer may be liable for retaliation if it permits actions such as "moving the person from a spacious,

brightly lit office to a dingy closet, depriving the person or previously available support services . . . or cutting off challenging assignments"); *Dahm v. Flynn*, 60 F.3d 253, 257 (6th Cir. 1994) (finding that "a dramatic downward shift in skill level required to perform job responsibilities can rise to the level of an adverse employment action").

F. Tenth Circuit's Broad Definition.

The Tenth Circuit, which utilizes a case-by-case approach, has expressly rejected any requirement that an employment action must be material in order to be adverse. *See Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998) (finding that verbal interrogation and reprimand, threats to withdraw supervision and not renew the employee's contract constituted adverse actions even though there was no impact on the "terms and conditions" of the plaintiff's employment); *see also Corneveaux v. Cuna Mutual Insur. Group*, 76 F.3d 1498, 1502 (10th Cir. 1996); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (finding that malicious prosecution by former employer can be adverse employment action). *But see Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 532 (10th Cir. 1998) (finding that an involuntary lateral transfer without more does not constitute an adverse action). In the Tenth Circuit, Title VII employment discrimination actions need not be founded solely on monetary losses in wages or benefits. *Id.*

G. Eleventh Circuit's Broad Definition.

The Eleventh Circuit has enunciated the rule that "[i]n a Title VII case, a transfer to a different position can be 'adverse' if it involves a reduction in pay, *prestige or responsibility*." *Doe v. Dekalb County School Dist.*, 145 F.3d 1441, 1448 (11th Cir. 1998) (emphasis added); *see also*

Hinson v. Clinch County, Ga. Bd. of Educ., 231 F.3d 821 (11th Cir. 2000). Thus, Title VII's protection extends to actions that fall short of ultimate employment decisions. *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (finding that employer requiring plaintiff to work without lunch break, giving her a one-day suspension, soliciting other employees for negative statements about her, changing her schedule without notification, making negative comments about her, and needlessly delaying authorization for medical treatment all constituted adverse actions pursuant to Title VII); *Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 964 (11th Cir. 1997)(Evidence of discrepancies between plaintiff's assignments and those of the other managers, as well as the delayed manner in which he became a salaried employee, could support a finding of discrimination); *McCabe v. Sharrett*, 12 F.3d 1558, 1564 (11th Cir. 1994) (stating that "employee who was given fewer responsibilities and was made to perform more menial tasks suffered adverse employment action").

In *Hinson*, the Eleventh Circuit found that a material question of fact existed about whether the plaintiff had suffered an adverse action when she was removed from her position as principal of the only high school in the district and was transferred to a teaching position. Even though the plaintiff maintained the same salary, she had to work an additional 20 days a year more than other teachers, and several board members testified that her new teaching position held more prestige than her prior one had, the court held that whether she had suffered an adverse action was a question of fact. *Id.* at 820. The *Hinson* court acknowledged the possibility that the additional requirements of her new job, i.e. showing up to work twenty days more than other teachers, could have been placed on the position specifically to keep her from challenging the reassignment. *Id.* at 830. The question of fact concerning the prestige issue was

enough to preclude summary judgment. *Id.*

H. Petitioners' Evidence Is Sufficient In Majority of Jurisdictions.

Petitioners' claims of discrimination and retaliation are supported by evidence of

(1) negative comments in appellant's performance appraisals,

(2) refusal to allow appellants to attend certain conferences,

(3) elimination of professional responsibilities,

(4) denial of leave, and

(5) excessive supervision.

This evidence establishes that Petitioners have suffered adverse employment actions, cognizable under the civil rights statutes, as interpreted by the First, Second, Seventh, Ninth, Tenth and Eleventh Circuits. Additionally, the Petitioners have two further incidents demonstrating retaliation:

(6) receipt of "black dot" envelopes in their NEA envelopes, and

(7) Campbell's supervisor informing a prospective employer of the pending lawsuit.

These events support Petitioners' claims under the broad interpretation of the civil rights statutes' adverse action requirement.

I. Minority of Jurisdictions Follow Narrow Definition.

The Fourth, Sixth and Eighth Circuits have construed the term "adverse action" restrictively, as does the D.C. Circuit (see subsection J below). In these jurisdictions, only "ultimate employment actions" such as "hiring, firing, promoting and demoting constitute actionable adverse employment actions." *These Circuits so tightly restrict the definition of adverse employment action that hostile working environment and other discriminatory situations can flourish without restraint -- all because they do not constitute "ultimate employment actions."*

The Fourth Circuit has determined that a plaintiff must establish some "significant detrimental effect" to establish a valid Title VII claim. *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999). Thus, "there are many interloculatory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of [civil rights statutes]." *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981).

In *Kocsis v. Multi-care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996), the Sixth Circuit court acknowledged that it was bound by prior precedent that absent a change in salary or work hours, a reassignment does not ordinarily constitute an adverse action. *Id.* at 885; *see also Yates v. Avco Corp*, 819 F.2d 630, 638 (6th Cir. 1987). The Sixth Circuit generally holds to a restrictive requirement that only "ultimate employment actions" trigger the protection of the civil rights statutes. Yet that court has also broadened the rule slightly, holding that "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished responsibilities" constitute an

adverse action. *Kocsis*, 97 F.3d at 885-86.

In *Spears v. Missouri Dep't of Corrections and Human Resources*, 210 F.3d 850 (8th Cir. 2000), the Eighth Circuit court noted that "[i]t is well established that '[a] transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action." *Id.*, at 853-54 (citing *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)); *see also Hoffman v. Rubin*, 193 F.3d 959, 964 (8th Cir. 1999) (stating that a transfer to a different city was not an adverse action as long as rank, pay and benefits remained unaltered).

The Fifth Circuit takes even a more unique view and finds a more stringent standard for a Title VII plaintiff pursuing a retaliation claim than for one pursuing a disparate treatment claim based on a reading of the statutory provisions. In *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995), the court held that

> Title VII was designed to address ultimate employment decisions, not to address every single decision made by employers that arguably might have some tangential effect upon those ultimate decisions.
>
> * * *
>
> "Ultimate employment decisions" include acts "such as hiring, granting leave, discharging, promoting, and compensating."

Id. at 782. In *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), the Fifth Circuit further distinguished discrimination and retaliation claims, ruling that while the anti-discrimination provisions of Title VII in 42 U.S.C. §

2000e-2 extend to actions which "would tend to deprive" the employee of "opportunities" or "adversely affect his status", the retaliation provisions of 42 U.S.C. § 2000e-3 are strictly limited to "ultimate employment decisions...such as hiring, granting leave, discharging, promoting, and compensating." *Mattern*, 104 F.3d at 707-09, *citing Dollis v. Rubin*, 77 F.3d 777, 781_82 (5th Cir.1995) and *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981).

Specifically, the Fifth Circuit stated "Title VII's anti-retaliation provision refers to ultimate employment decisions, and not to an 'interloculatory or mediate" decision which can lead to an ultimate decision. *Mattern*, 104 F.3d 702 at 708. As such, the Fifth Circuit has come to the conclusion that there is a "lighter 'tend to adversely affect' standard" for discrimination claims made under civil rights statutes. *See Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398 (5th Cir. 1999). Even using the more stringent standard for retaliation claims, the Fifth Circuit has found that "[t]ransfers can constitute adverse employment actions if they are sufficiently punitive, or if the new job is markedly less prestigious and less interesting than the old one." *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) (finding a First Amendment claim to be an adverse action pursuant to 42 U.S.C. § 1983 for which the 5th Circuit applies the same standards as Title VII).

J. D.C. Circuit Falls Within Minority of Jurisdictions.

In *Brown v. Brody*, the D.C. Circuit restricted the notion of "adverse employment action" to exclude career-damaging lateral transfers, downgraded performance ratings, and an unjustified letter of admonishment. *Brown*, 199 F.3d at 457-58. The Brown court expressly distanced itself from

prior D.C. Circuit decisions that took the majority view of broader inclusion.

For example, the *Brown* court sidestepped the ruling in *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987). In *Palmer*, the court held that Title VII covered "all personnel actions regardless of whether the personnel action affects promotions or causes other tangible or economic loss." *Brown*, 199 F.3d at 453, quoting *Palmer*, 815 F.2d at 98. The *Palmer* rule accords with the majority view that broadly and fairly accords civil rights plaintiffs opportunities to redress discrimination that does not directly affect their pocket book.

Applying the *Palmer* rule to the facts in *Brown* would have allowed the plaintiff there to proceed to trial. Likewise, Petitioners' case would likely go to trial were *Palmer* followed here. Instead, the D.C. Circuit below expressly rejected Petitioners' discrimination and retaliation claims as too broad and thus not actionable. *Campbell v. National Education Ass'n*, 2000 WL 1584589 at *3, No. 99-7122, at 3a (supplied in Appendix). Thus, the D.C. Circuit's *Brown* decision and its decision below in this case both depart from precedent and from the law in a majority of other circuits.

This Court can resolve the apparent conflict in the D.C. Circuit's definition of "adverse employment action" and the split among the federal circuit jurisdictions on the same point. Clarity on this point of law will help employers and employees all across America to better understand their duties of conduct in the employment relationship. Such clarity can help reduce future trial and appellate litigation nationwide, while assuring that the objectives of anti-discrimination laws are achieved for all Americans.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and thereupon the decision of the District of Columbia Circuit Court of Appeals should be reversed and this matter should be remanded to the lower courts for further proceedings consistent with the ruling of this Court.

Respectfully submitted,

RICHARD L. SWICK
Counsel of Record
DAVID H. SHAPIRO
SWICK & SHAPIRO, P.C.
1225 Eye Street, N.W.
Washington, D.C. 20005
(202) 842-0300
Attorneys for Petitioner

(Any footnotes trail end of each document)

No. 99-7122 Consolidated with 99-7123

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Valencia Campbell, et al.,
Appellants,

v.

National Education Association,
Appellee.

October 3, 2000, Filed

COUNSEL:
For VALENCIA CAMPBELL, CHERYL LUCAS, TASHA MCGUTHRIE, DEAGELIA M. PENA, BARBARA VALENTINE, Plaintiffs - Appellants (99-7122): David H. Shapiro, Richard L. Swick, Swick & Shapiro, Washington, DC.

For NATIONAL EDUCATION ASSOCIATION, Defendant - Appellee (99-7122): W. Gary Kohlman, Robert Mark Weinberg, Bredhoff & Kaiser, Washington, DC.

For NATIONAL EDUCATION ASSOCIATION, Defendant - Appellee (99-7122): Maurice Joseph, National Education Association, Washington, DC.

For VALENCIA CAMPBELL, CHERYL LUCAS, TASHA MCGUTHRIE, DEAGELIA M. PENA, BARBARA VALENTINE, Plaintiffs - Appellants (99-7123): David H.

Shapiro, Richard L. Swick, Swick & Shapiro, Washington, DC.

For NATIONAL EDUCATION ASSOCIATION, Defendant - Appellee (99-7123): W. Gary Kohlman, Robert Mark Weinberg, Bredhoff & Kaiser, Washington, DC. Maurice Joseph, National Education Association, Washington, DC.

JUDGES:
Before: WILLIAMS, SENTELLE and ROGERS, Circuit Judges.

OPINION:

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral argument of the parties. The court has determined that the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 36 (b). It is

ORDERED AND ADJUDGED that summary judgment for defendant be affirmed for the reasons stated in the accompanying memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

MEMORANDUM

Plaintiffs-Appellants appeal the grant of summary judgment to Defendant-Appellee ("NEA") in two consolidated employment discrimination actions brought under *42 U.S.C. § 1981* and the District of Columbia Human Rights Act, D.C. Code § § 1-2501 *et seq.* ("DCHRA"). Appellants, five minority women who were employed at

NEA's Research Division, present broad claims that NEA maintained a discriminatory promotion system and engaged in discriminatory practices against minority women. Upon review of the record, we conclude that appellants have failed to demonstrate entitlement to relief for three reasons. First, appellants may not rely on the "continuing violation" theory and hence may not expand their claims beyond those that fall within the DCHRA's one-year statute of limitations and the requirements of § 1981. Second, appellants have failed to present material facts and/or admissible evidence in compliance with Local Rule 108(h). Third, appellants' broad claims of discrimination and retaliation fail to identify actionable conduct.

I.

The "Continuing Violation" Theory. In 1993, the district court dismissed the majority of appellants' claims. The court dismissed all claims under § 1981, with the exception of appellant Pena's claim that NEA discriminatorily denied her the position of Manager of Surveys, on the grounds that they were based on conduct subsequent to the formation of an employment contract and therefore were not actionable. Although the Civil Rights Act of 1991 expanded the scope of § 1981 and would encompass the additional claims that appellants assert, the 1991 amendments do not apply retroactively. *See Landgraf v. USI Film Products, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994).* Hence, appellants were obligated to present the majority of their claims under the DCHRA and to adhere to the DCHRA's one-year statute of limitations. The district court dismissed all claims based on conduct that fell outside this statutory period.

Appellants seek to overcome these DCHRA and § 1981 limitations by invoking the "continuing violation" theory. *See, e.g., Milton v. Weinberger, 207 U.S. App. D.C. 145, 645 F.2d 1070 (D.C. Cir. 1981); Shehadeh v. C&P*

Telephone Co., 193 U.S. App. D.C. 326, 595 F.2d 711 (D.C. Cir. 1978). They contend that the continuing violation theory applies because they are attacking NEA's "ongoing program of discrimination, rather than any of its particular manifestations." *Shehadeh, 595 F.2d at 724.* Moreover, appellants contend that, because this continuing promotion system was in place before and after 1991, their claims are covered by the 1991 Civil Rights Act and do not rely on the Act's retroactive application. As a result, appellants maintain, the DCHRA statute of limitations and the restrictions of § 1981 are inapplicable, and the court should consider all of appellants' claims regardless of when the allegedly discriminatory conduct occurred.

A key premise of the continuing violation theory, however, is that the limitations period should not begin until a reasonable person would have been aware that her rights were violated. *See Taylor v. Federal Deposit Insurance Corp., 328 U.S. App. D.C. 52, 132 F.3d 753, 765 (D.C. Cir. 1997); Dasgupta v. Univ. of Wisconsin Bd. of Regents, 121 F.3d 1138, 1139 (7th Cir. 1997).* The record shows that, on several occasions before November 1990, appellants complained of promotions denied and sought administrative remedies against NEA. In 1975, for example, appellant Valentine filed an administrative complaint with the District of Columbia Office of Human Rights after she was denied a promotion. Appellant Pena also asserted her belief that the NEA's failure to promote her in the 1980s was rooted in discriminatory motive and filed grievances with NEA. Such conduct demonstrates that appellants interpreted NEA's actions as discriminatory when these events occurred. As a result, appellants may not assert now that NEA's actions were part of a continuing violation.

Hence, the district court correctly limited appellants' admissible claims to (1) appellant Pena's claim under § 1981 and (2) claims under the DCHRA arising from actions that occurred after November 1990.

II.

Local Rule 108(h). Local Rule 108(h) "places the burden on the parties and their counsel . . . to crystallize for the district court the material facts and relevant portions of the record." *Jackson v. Finnegan, 322 U.S. App. D.C. 35, 101 F.3d 145, 151 (D.C. Cir. 1996).* Appellants' Rule 108(h) statement, however, does not identify material issues of fact or admissible evidence that would preclude the entry of summary judgment for NEA. Instead, appellants merely respond in general terms to NEA's Rule 108(h) statement.

With respect to appellant Pena's promotion claim, appellants provide nothing more than references to appellant Pena's own declaration to support her assertion that she was discriminatorily denied the position of Manager of Surveys. For example, in her declaration, appellant Pena claims that her NEA supervisors discriminatorily outlined "communication problems" in her evaluations in order to "build up a systematic record on which to base denying [her] a promotion." NEA's Rule 108(h) statement responds to this allegation by detailing a number of reasons for not selecting appellant Pena. The most prominent of these reasons was that the current manager was the unanimous, non-discriminatory choice of a selection panel, which included women and minorities, based on superior relevant skills. To rebut NEA's claim that its employment decision was non-discriminatory, appellants' Rule 108(h) statement must provide something more than appellant Pena's mere disagreement with NEA's decision. *See Brown v. Brody, 339 U.S. App. D.C. 233, 199 F.3d 446, 458-59 (D.C. Cir. 1999).*

Appellant Pena's declaration also claims that the "close similarity between the management generated job requirements and stated educational achievements" of the person who was appointed were evidence that "the position selection was certainly rigged." Appellants' Rule 108(h) statement, however, refers to no evidence that transforms this

claim into anything more than a broad accusation insufficient to rebut NEA's explanation for its decision. To support their claim that NEA changed the selection criteria to fit the qualifications of the current manager, appellants could have offered, for example, NEA documents to contrast the previous management's job description with that used for the current management position.

As indicated by past employment discrimination cases where plaintiffs survived summary judgment, appellants were obligated to proffer more concrete evidence of their employers' discriminatory conduct. In *Aka v. Washington Hospital Center, 332 U.S. App. D.C. 256, 156 F.3d 1284 (D.C. Cir. 1998)*(en banc), the required qualifications for the position at issue were "previous hospital experience in pharmacy services" and "knowledge of medical terminology." *156 F.3d at 1295.* The plaintiff provided detailed evidence that his nineteen years' experience as a hospital orderly involved continuous interaction with the pharmacy and allowed him to develop a familiarity with medical terminology. *Id.* at 1296. Moreover, the plaintiff presented evidence of his educational qualifications (a master's degree in business and professional administration, with a concentration in health management) and clearly demonstrated that his qualifications were far superior to those of the employer's choice for the position, who did not even have a college degree. *Id.* at 1297.

Unlike the plaintiff in Aka, appellants do not properly establish a factual dispute in their Rule 108(h) statement. As the court has warned, "failure to file a proper Rule 108(h) statement 'may be fatal to the delinquent party's position.'" *Jackson, 101 F.3d at 151 (quoting Gardels v. Central Intelligence Agency, 205 U.S. App. D.C. 224, 637 F.2d 770, 773 (D.C. Cir. 1980)).* Absent proper Rule 108(h) assertions of material issues of fact and admissible evidence concerning appellant Pena's promotion claim, the court is unable to analyze the substance of her promotion dispute.

III.

Claims of Discriminatory Action and Retaliation. Appellants also allege claims of discrimination and retaliation based on a broad range of conduct by NEA officials, including (1) negative comments in appellants' performance appraisals, (2) refusal to allow appellants to attend certain conferences, (3) elimination of professional responsibilities, (4) denial of leave, and (5) excessive supervision. In addition, appellants point to two instances that allegedly demonstrate retaliation: (1) Appellants (as well as a male colleague) received "black dot" envelopes in their NEA mailboxes, and (2) Campbell's supervisor informed a prospective employer of the pending lawsuit. To substantiate these claims, appellants rely almost exclusively on their own declarations. None of these claims, however, is actionable under the law of this circuit.

To survive summary judgment, appellants must "show[] that they have been subjected to some sort of adverse personnel or employment action," i.e., "some form of legally cognizable adverse action by the employer." *Brown, 199 F.3d at 452-53.* In defining such an action, the *Brown* court adhered to the Supreme Court's recent interpretation of a "tangible employment action": "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *339 U.S. App. D.C. at 243, 199 F.3d 446, 456 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998)).* Moreover, to prove disparate treatment, appellants must demonstrate that "all of the relevant aspects" of their employment were "nearly identical" to those of the employees with whom appellants compare themselves. *Neuren v. Adduci, Mastriani, Meeks & Schill, 310 U.S. App. D.C. 82, 43 F.3d 1507, 1514 (D.C. Cir.*

1995)(quoting Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 (6th Cir. 1994)).

None of appellants' claims involves a significant change in appellants' employment or benefits, as required by *Burlington* and *Brown*. Rather, the actions that appellants denounce simply reflect the at times difficult relationship between employer and employee. *See Taylor, 132 F.3d at 765.* The negative comments on appellants' otherwise positive evaluations do not amount to an adverse employment action. *See Brown, 199 F.3d at 458.* Similarly, NEA's denial of projects and/or conferences that seemed attractive to appellants is also insufficient under *Brown*, which states that "mere idiosyncracies of personal preference are not sufficient to state an injury." *Id.* at 457. NEA stated -- and appellants did not refute -- that appellants were permitted to attend those conferences that complied with NEA rules and that were directly relevant to their professional development. Finally, the minor changes in professional responsibilities that appellants denounce "do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes." *Mungin v. Katten Muchin & Zavis, 325 U.S. App. D.C. 373, 116 F.3d 1549, 1556-57 (D.C. Cir. 1997).*

Similarly, appellants' allegations of disparate treatment fail due to their lack of specificity. In their declarations, appellants provide numerous general, unsubstantiated statements that whites and/or males were treated differently from appellants.[1] Such conclusory statements do not present genuine issues of material fact and are therefore insufficient to defeat summary judgment. *See Wixson v. Dowagiac Nursing Home, 87 F.3d 164 (6th Cir. 1996).* When appellants do provide detail concerning colleagues who were treated more favorably, they fail to establish, as required by *Neuren*, that the employees were in "nearly identical" positions. For example, in her declaration, appellant Campbell states that, contrary to her situation,

Tomas Saucedo (a Hispanic male) and John Yrchick (a white male) were not obligated to adhere to formal NEA procedures to participate in a conference. Appellants provide no information, however, about these men's rank, position, or areas of specialization within the NEA Research Division. Similarly, appellant McGuthrie's declaration states that, while she was not allowed to order many books, John Yrchick and Carol Norman ordered numerous books. Appellants' declarations make clear, however, that Yrchick and Norman were of significantly higher rank than appellant McGuthrie: Yrchick was hired at Rank 12, and Carol Norman was appellant McGuthrie's supervisor.

Appellants' retaliation claims -- namely the "black dot" incident and the comments by appellant Campbell's supervisor -- also fail for lack of specificity. To establish a prima facie case of retaliation, appellants must show that: (1) they engaged in activity protected by the statute; (2) appellee engaged in conduct having an adverse impact on appellants; and (3) the adverse employment action was causally related to appellants' exercise of their protected rights. *McKenna v. Weinberger, 234 U.S. App. D.C. 297, 729 F.2d 783, 790 (D.C. Cir. 1984).* While appellants engaged in protected activity and claim harm from the "black dot" incident and the comments by Campbell's supervisor, appellants provide insufficient details concerning these events. Appellants do not provide evidence to link the black-dot letters to NEA, nor do they provide details to clarify the context and substance of the comments by appellant Campbell's supervisor.

Finally, appellants have not demonstrated that the challenged actions contributed to a hostile work environment. *See Brown, 199 F.3d at 454 (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)).* Instead, appellants largely attack appellee for forcing them to adhere to established workplace policies.

Footnotes

[1] Examples of these statements include: (1) "white and male staffers are always assigned to participate in . . . conferences"; (2) "whites and males in the Research Division have routinely had lunch and other social engagements with NEA governance; (3) whites or males have missed staff meetings and "they were not criticized for this"; (4) "white employees merely have to make a verbal request to attend a particular conference . . ."; and (5) the supervisors did not "devote this amount of time to other males or whites under their supervision."

No. 91-3264 Consolidated with 92-1637

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Valencia Campbell, et al.,
Plaintiffs,

v.

National Education Association,
Defendant.

June 10, 1999, Filed

ORDER

Upon consideration of the motion of defendant National Education Association for summary judgment, plaintiffs' opposition thereto, the supplemental memoranda of the parties, and the entire record herein, and for the reasons advanced by defendant and previously set forth in this case in the Memorandum and Order of November 21, 1996, it is, this 10th of June, 1999,

ORDERED, that dafendant's motion for summary judgment is granted. See also Carpenter v. Federal National Mortgage Association, 1999 WL 241773 (D.C. Cir. Apr 27, 1999).

Thomas Penfield Jackson
U.S. District Judge

No. 97-7041 Consolidated with 97-7042

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Valencia Campbell, et al.,
Appellants,

v.

National Education Association,
Appellee.

February 2, 1999, Filed

ORDER

Upon consideration of appellees' motion to govern future proceedings and the opposition thereto, and appellant's motion to govern future proceedings, it is

ORDERED that these consolidated interlocutory appeals be remanded to the district court for consideration of appellant's motion for summary judgment in light of Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en banc). This court addressed the question certified for interlocutory appeal. A plaintiffs prima facie case, standing alone, is not necessarily sufficient to defeat a defendant's motion for summary judgment, but may be sufficient if it strongly suggests intentional discrimination. See id. at 1289 n.4. On the other hand, even a prima facie case combined with evidence to discredit the employer's stated reasons for its decision is not necessarily sufficient to defeat a defendant's summary judgment motion. See id. at 1289-90.

The court must consider all the evidence in its full context to determine whether the plaintiff has met her burden of showing that a reasonable factfinder could conclude that she suffered discrimination. See id. at 1290.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See D.C. Cir. Rule 41.

Per Curiam

No. 97-7041 Consolidated with 97-7042

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Valencia Campbell, et al.,
Appellants,

v.

National Education Association,
Appellee.

October 30, 1998, Filed

ORDER

By order of this court filed September 5, 1997, this case was held in abeyance pending disposition of 96-7089, Aka v. Washington Hospital Center. This court's decision in Aka v. Washington Hospital Center issued on October 9, 1998. Upon consideration of the foregoing, it is

ORDERED, on the court's own motion, that the parties file motions to govern future proceedings in this case on or before November 30, 1998.

The Clerk is directed to send this order and a copy of the court's decision in Aka v. Washington Hospital Center to counsel for the parties both by certified mail, return receipt requested, and by first class mail.

FOR THE COURT:
Mark J. Langer
Clerk

No. 96-8138

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Valencia Campbell, et al.,
Respondents,

v.

National Education Association,
Petitioners.

February 27, 1997, Filed

ORDER

Upon consideration of the petition for permission to appeal and the opposition thereto, it is

ORDERED that the petition for permission to appeal be granted because there appears to be a controlling issue of law, the resolution of which may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 24 (2d Cir. 1990).

The Clerk is directed to transmit a certified copy of this order to the district court. The district court shall file the copy of the order as a notice of appeal pursuant to Fed. R. App. P. 5, and shall collect the mandatory docketing fees from counsel. Upon payment of the fees, the district court shall certify and transmit the preliminary record to this court, after which the case will be assigned a regular docket number.

Per Curiam

No. 91-3264 Consolidated with 92-1637

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Valencia Campbell, et al.,
Plaintiffs,

v.

National Education Association,
Defendant.

November 21, 1996, Filed

MEMORANDUM AND ORDER

In these consolidated employment discrimination/retaliation actions for compensatory and punitive damages and equitable relief, five minority female employees charge their defendant employer, National Education Association ("NEA"), with pursuing promotional policies and practices that for more than a decade, they say, have impeded their career advancement On the basis of their race, sex, and national origin.[1]

Discovery has been completed, and the case is ready for an imminent trial. According to the Final Pretrial Order and Joint Pretrial Statement, plaintiffs plan to call as many as 44 witnesses and offer some 247 exhibits in evidence. Direct examination alone of plaintiffs' witnesses is estimated to take. more than 60 hours to present.

Defendant NEA has filed a comprehensive pre-emptive motion for summary judgment. Supported by some six affidavits, three depositions, and various documents,

NEA's motion endeavors to demonstrate that there are, in fact, *no* genuine issues of material fact in dispute, the massive pretrial record notwithstanding. For each and every one of the myriad acts or omissions perceived by plaintiffs to have been discriminatory in. purpose or effect, NEA proffers an explanation or justification which, if true, reflects a legitimate non-discriminatory animus.

Neither in their opposition to defendant's motion nor in oral argument thereon have the plaintitts shown specific facts or circumstances beyond the elements of their prima facie case suggestive of "pretext" on defendant's part. Plaintiffs' position is, in effect, that having shown that they are able to establish a prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department Of Community Affairs v. Burdine, 450 U.S. 248 (1981), they have precluded summary judgment for the defendant employer as a matter of law.

Citing Barbour v. Merrill, 48 F.3d 1270 (D.C. Cir. 1995), plaintiffs insist that, no matter how persuasive NEA's protestations of innocence may appear in the record, plaintiffs are entitled to have a jury determine their credibility upon the basis of their reiteration from the witness stand at trial. In other words, even in the absence of any substantive contradictory evidence in their opposition to defendants motion for summary judgment tending to show that defendant's reasons for doing or -- not doing -- what it did were pretextual, plaintiffs contend that a jury might, disbelieve them when uttered at trial ad without more, proceed to awaid them both compensatory and punitive damages and establish their entitlement to equitable relief.

In St. Mary's Honor Center v. Wicks, 509 U.S. 502 (1993), the Supreme Court reversed an appellate decision that held, after trial,. that the trial court's disbelief of "pretextual" reasons compels, rather than merely permits, a finding of

discrimination on the strength of the prima facie case alone. In Barbour v. Merrill, supra, the D.C. Circuit affirmed a jury verdict finding discrimination, holding that the jury's disbelief of "pretextual" reasons was sufficient to support the verdict on the strength of the prima facie case alone. This case focuses on the significance of and necessity for a showing of corroborative evidence of "pretext" in advance at trial in the context of a motion for summary judgment.[2]

Here the defendant NEA has proffered evidence of legitimate non-discriminatory reasons for what it has done or not done in relation to plaintiffs. Only if those reasons are disbelieved may plaintiffs rely upon their prima facie case as sufficing to show intentional discrimination as to which they "at all times bear the 'ultimate burden of persuasion." Hicks, 509 U.S. at 511. NEA submits that it has shown there is an absence of evidence to disbelieve its reasons, or, stated differently, that plaintiff has failed to show that there is evidence upon 'which to do so.

The issue is, thus, whether, upon .a dispositive motion by an employer in an employment discrimination case in advance of trial, 'in which the plaintiff's proof consists of a prima facie case, and no evidence of pretext is proffered of record to rebut the defendant's showing of legitimate non-discriminatory motive, is summary judgment for defendant nevertheless precluded as matter of law by St. Mary's Honor Center v. Hicks, 509 U.S 502 (1993) as interpreted in Barbour v. Merrill, 48 F.3d 1270 (D.C. Cir. 1995)?

As this Court reads Barbour *v.* Merrill the answer for the D.C. Circuit is in the affirmative, and it observes that the Third and Fourth Circuits have apparently reached a similar conclusion in applying the law of Hicks to motions for summary judgments under rule 56.[3] To the contrary, however, are decisions from the First, Second, Seventh, and Eighth Circuits.[4]

In accordance with 28.U.S.C. § 1292(b), the Court states that it is of the opinion that the issue involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

It is, therefore, this 24th day of November, 1996, ORDERED, that the motion of defendant National Education Association for summary judgment is denied without prejudice, but the trial date of December 2, 1996, is vacated, and all proceedings herein stayed for a period of ten (10) days to permit application by defendant to the U.S. Court of Appeals for the District of Columbia Circuit for leave to take an appeal herefrom, and thereafter until disposition of any appeal so allowed.

Thomas Penfield Jackson
United States District Judge

Footnotes

[1] In essence, plaintiffs' discrimination claims consist of allegations of a discriminatory promotion system carried out through excessive monitoring, negative performance appraisals. and the denial of "promotion-enhancing" opportunities such as "high visibility" assignments, training, and attendance at various conferences.

[2] Under Fed. R. Civ. P. 56(c), a non-moving party who fails "to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof" in opposition to a motion for summary judgment, must lose. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Conversely, the moving party must win if it can show "that there is an absence of evidence to support the nonmoving

party's case." Id. at 325.

[3] Fuentes v. Perskie, 32 F.3d 759 (3rd Cir. 1994); Runnebaum v. NationsBankof Maryland, N.A., 95 F.3d 1285 (4th Cir. 1996).

[4] Udo v. Tomes 54 F.3d 9 (1st Cir. 1995) and Fennell v. First Step Designs Ltd. 83 F.3d 526 (1st Cir. 1996): Holt v. KMI-Continental, Inc., 95 F.3d 123 (2nd Cir. 1996); Weisbrot v. Medical College of Wisconsin, 79 F.3d 677 (7th Cir. 1996); Johnson v. Baptist Medical Center, 97 F.3d 1070 (9th Cir. 1996).

No. 99-7122 Consolidated with 99-7123

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Valencia Campbell, et al.,
Appellants,

v.

National Education Association,
Appellee.

November 8, 2000, Filed

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

No. 99-7122 Consolidated with 99-7123

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Valencia Campbell, et al.,
Appellants,

v.

National Education Association,
Appellee.

November 8, 2000, Filed

ORDER

Upon consideration of appellants' petition for rehearing filed October 17, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk